United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: February 25, 2005

TO : Celeste J. Mattina, Regional Director
Region 2

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Operative Plasterers and Cement
Masons Local 530, AFL-CIO
(Eurotech Construction Corp.)
Case 2-CD-1097

560-2575-6721
560-7580-6050
560-7580-6067
560-7580-8020-4425

This Section 8(b)(4)(ii)(D) case was submitted for advice as to whether a union unlawfully maintained a Section 301/ERISA lawsuit that alleged that a construction contractor breached a union signatory subcontracting clause after an arbitral work jurisdiction award that such disputes should be resolved in favor of the employer's work assignment.

We conclude that the charge should be dismissed, absent withdrawal. The contractor whom the union sued was not the employer that made the challenged work assignment. Therefore, the suit was not coercive within the meaning of Section 8(b)(4)(ii)(D) and did not have an unlawful object.

FACTS

The Charging Party, Eurotech Construction Corp. ("Eurotech"), is a multi-trade subcontractor in the construction industry. Eurotech is a member of the Building Contractors Association ("BCA") and is bound by collective-bargaining agreements between BCA and Bricklayers Local 1 ("Local 1"). The most recent agreement between BCA and Local 1 is effective from July 1, 2002 through June 30, 2005, and covers the installation of concrete block and related work, including "plastering and cement finishing," and "such other work as the International Union may from time to time determine." The agreement prohibits BCA members from subcontracting bargaining unit work unless the work is performed pursuant to a general contract and is subcontracted to an employer having a collective-bargaining agreement with Local 1.

Eurotech has also been party to an independent "plastering agreement" with Plasterers Local 530 ("Local

530"). The most recent Local 530 plastering agreement expired on or about June 30, 2002. Local 530 sent Eurotech a proposed successor plastering agreement some time before February 2003.[1] The proposed successor agreement covered, inter alia, "exterior plastering of...stucco," and prohibited subcontracting of work performed at the jobsite to employers unless they had a contract with Local 530. On February 26, 2003, Eurotech sent Local 530 a signed copy of the agreement, marked with some proposed changes.[2] Local 530 never explicitly responded to either of the changes Eurotech had proposed. Some time thereafter, Eurotech received through the mail a copy of the signature page of the proposed successor agreement, which was now also signed by Local 530. Since February 2003, Eurotech has paid wages and made benefit fund contributions based upon the rates contained in the proposed successor agreement that Local 530 provided to it. Eurotech has complied with the successor agreement in all other respects.[3]

In early 2004,[4] as a result of ongoing jurisdictional disputes, the Bricklayers, Plasterers, and Laborers international unions appeared before a National Arbitration Panel convened under the AFL-CIO Plan for the Settlement of Jurisdictional Disputes in the Construction Industry

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[1] The proposed agreement states that it is effective from July 1, 2002 through January 31, 2006.

[2] Eurotech had proposed changes to two sections of the agreement. The first change amended a provision (Article 7, Section 7) permitting Local 530 to remove its members from a job within 24 hours notice if Eurotech had failed to provide sufficient records for Local 530 auditors to be able to determine whether Eurotech had paid appropriate wages and benefit fund contributions. Eurotech proposed that the company be permitted to arbitrate a dispute regarding the audit issue prior to a work stoppage. The second proposed change involved the arbitration provisions. Eurotech substituted the language "Eurotech Construction Corp." for the provision's language referring to "the Association," likely a reference to the BCA, since it was an independent agreement.

[3] This includes submitting to periodic audits to ensure that correct benefit fund contributions have been made. Local 530 has not filed any grievances since the expiration of the old agreement, and there have been no work stoppages that would implicate the changes Eurotech sought to make to Article 7, Section 7.

[4] All dates are in 2004 unless otherwise indicated.

("Plan").[5] In a decision dated February 11, 2004, the Panel ruled that jurisdictional disputes involving the Bricklayers and Plasterers would be resolved "in favor of the work assignment of the involved Employer."[6]

In about January, Eurotech began work on a project to build dormitories at SUNY Stonybrook on Long Island. Eurotech was retained to place cement block for interior and exterior walls, and place stucco coating on the exterior surfaces. At around the same time, Eurotech was retained to perform similar work on another project at 4 Union Square South in Manhattan. At both projects, Eurotech performed the placement of cement block, but decided it would subcontract the stucco work.

In about February, Eurotech solicited bids from subcontractors to perform the stucco work at SUNY Stonybrook. Eurotech solicited bids from companies that had contracts with Local 1 and companies that had contracts with Local 530. Before Eurotech decided which company would receive the stucco subcontract, an official from the New York City Building Trades Council advised a Eurotech representative that, under the February 11 Panel Decision, Eurotech was within its rights to determine which company and union would perform the stucco work, and that the unions would have to resolve any jurisdictional dispute themselves. Eurotech ultimately subcontracted the stucco work at SUNY Stonybrook to Conti & Carlucci Co. ("Conti") in March, because Conti had submitted the most competitive bid. Conti has a collective-bargaining relationship with Local 1, but not with Local 530.

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[5] The Plan applies to national and international unions affiliated with the AFL-CIO Building and Construction Trades Department, and their local constituent bodies. The Plan also applies to employers who sign a stipulation setting forth that they are willing to be bound by an agreement establishing the Plan, or are members of signatory employer associations. Article X of the Plan contains a procedure for resolution of "repetitive" and "disruptive" disputes over general classes of work by a National Arbitration Panel. The Panel is empowered to hold a hearing and receive briefs from all unions and employer associations involved. The Panel then renders a decision which is served on all of the involved parties. Article V of the Plan also provides for the resolution of competing jurisdictional claims for specific work by arbitration. The proceeding involved here was under Article X.

[6] Panel Decision, p. 5.

In about May, a Conti official received a call from a Plasterers International representative covering the Northeast. The International representative warned the Conti official that if Conti took the SUNY Stonybrook job, the International representative would do what he had to do on his end to get what was due to him. The International representative said that the work was his work. The International representative said that Eurotech was signed with Local 530, and any fringe benefits from the job should go to Local 530. The International representative also said he would put up a picket line if he had to. The Conti official told the International representative to do what he had to do.

In about June, a Local 530 representative called a Eurotech official and said he was aware that the cement block on the SUNY Stonybrook project was going to receive a stucco finish. The Local 530 representative asked the Eurotech representative if Eurotech was subcontracting the stucco work to Conti, and the Eurotech representative confirmed. The Local 530 representative suggested that Eurotech only consider bids from Local 530 contractors. The Eurotech official responded that Eurotech had solicited bids from Local 530 and Local 1 contractors, and had awarded the job to Conti based upon competitive pricing. The Local 530 representative stated that the work was Local 530's work and that Eurotech should only be using trades people represented by Local 530. The Eurotech official responded that he was aware of the February 11 Panel Decision, and identified an official from the Building Trades Council who had informed him that Eurotech could use contractors signatory with either union to perform the work. The Eurotech official told the Local 530 representative that he should take up the issue with the Bricklayers.

Conti performed the stucco work at SUNY Stonybrook from July to September. There was no picketing. The job is now complete.

In about July, Eurotech decided to subcontract the stucco work at the 4 Union Square South project to Conti, based on competitive pricing and the high quality of work Conti had performed on the SUNY Stonybrook project. The same Local 530 representative called the Eurotech official and asked who would perform the stucco work at the 4 Union Square South project. The Eurotech official stated that it looked like Conti would get the contract. The Local 530 representative said that he did not want to see Local 1 members performing the stucco work, and that if Conti got the job, Local 530 would sue Eurotech, and it would cost Eurotech money one way or another.

Conti performed the stucco work at 4 Union Square South in September. There was no picketing. The job is now complete.

Eurotech was not bound by the Plan at the time it subcontracted the stucco work to Conti, but has informed the Region that it will agree to be bound by the Plan and will contact the Plan to implement that commitment. Eurotech has also agreed to abide by the February Panel Decision. There is no evidence indicating whether Conti is bound by the Plan, and if not, whether it intends to become bound by the Plan.

On July 9, Local 530 and the trustees of the Local 530 benefit funds ("Trustees") filed a complaint against Eurotech in the U.S. District Court, Southern District of New York,[7] alleging violations of Section 301 and ERISA with respect to both the SUNY Stonybrook and 4 Union Square South jobsites. The complaint basically alleges that Eurotech violated the union signatory subcontracting clause, failed to contribute to benefit funds and provide records for an audit to determine the amount of contributions due, failed to deduct and remit dues, and failed to pay Local 530 members wages and benefits. As a remedy, Local 530 and the Trustees seek wages, benefit fund contributions, and dues Eurotech should have remitted for the work it subcontracted to Conti; an audit to determine the amounts in question; and liquidated damages, interest, and attorneys fees available under ERISA. Local 530 and the Trustees also seek an order permanently enjoining Eurotech from violating the agreement in the future.[8]

ACTION

The charge should be dismissed, absent withdrawal. Local 530 sued Eurotech to enforce a colorable claim for breach of a union-signatory subcontracting clause. Because Eurotech was not the employer that made the challenged work assignment, the lawsuit is not coercive within the meaning

[7] Case No. 4-CV 5384.

[8] In a letter to the Region dated January 28, 2005, Eurotech stated that on February 1, 2005, it would file a motion with the court seeking a stay of the lawsuit pending the Board's resolution of the instant case. Eurotech further states that under the briefing schedule established by the judge, the plaintiffs' reply papers will be filed by the end of February 2005 and that the judge will likely consider the motion in early March 2005.

of Section 8(b)(4)(ii)(D) and does not have an unlawful object.

Section 8(b)(4)(ii)(D) generally prohibits unions from using threats, coercion, or restraint with an object of forcing or requiring an employer to assign certain work to one group of employees, rather than another. A violation of 8(b)(4)(ii)(D) requires a finding that (1) there are competing claims to disputed work between rival groups of employees, and (2) a party has used proscribed means to enforce its claim.[9]

Even assuming that there are "competing claims" for the disputed work,[10] Local 530's lawsuit against Eurotech is not "coercive" within the meaning of Section 8(b)(4)(ii)(D). The Board has held that a union's grievance or lawsuit alleging that a contractor has breached a lawful union signatory subcontracting clause is

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[9] Section 10(k) requires the Board to defer issuance of the 8(b)(4)(D) complaint and determine which group of employees is entitled to perform the disputed work, provided there is reasonable cause to believe 8(b)(4)(D) has been violated. If all parties are bound to a single method of voluntary adjustment, the 8(b)(4)(D) charge is held in abeyance for voluntary resolution of the dispute.

[10] While there is no doubt that Local 1, in performing the disputed work, has made a claim for the work within the meaning of 8(b)(4)(D), Longshoremen ILWU Local 14 (Sierra Pacific Industries), 314 NLRB 834, 836 (1994), it is far from clear that Local 530 made a competing claim in this case. The lawsuit against Eurotech, alone, is not a "competing claim" for the work. Laborers (Capitol Drilling Supplies), 318 NLRB 809, 810 (1995). Moreover, unless there were evidence that the Plasterers International representative was Local 530's agent, see fn. 18 below, his statements to the Conti official would not constitute a claim for the work at SUNY Stonybrook on behalf of Local 530. Compare Plasterers Local 502 (PBM Concrete), 328 NLRB 641, 643 (1999). An argument might be made, however, that Local 530 made a claim for the work prior to filing the lawsuit, in about June, when the Local 530 representative told the Eurotech official that the stucco work at SUNY Stonybrook was Local 530's work. Laborers Local 860 (Anthony Allega Cement Contractor), 336 NLRB 358, 361 & fn. 16 (2001), citing Longshoremen ILWU Locals 8 and 40 (Port of Portland), 233 NLRB 459, 461 (1977) ("[t]he Board has long held that a dispute cognizable under Section 8(b)(4)(D) may exist even though no demand has been addressed to the employer whose employees are performing the work").

not "coercive," even after the Board has issued a 10(k) order granting the disputed work to other employees, so long as that contractor was not the "assigning" employer.[11] Such contract actions do not directly conflict with the 10(k) award, because the alleged contract violation occurs the moment the work is subcontracted to a nonsignatory employer, and does not depend on which employees are actually assigned the work. Accordingly, a colorable "pay-in-lieu of" grievance or lawsuit against the signatory, which awarded a contract to a non-signatory subcontractor that ultimately assigned the work to a group of employees consistent with a 10(k) award, does not constitute a collateral attack on the 10(k) award and is not unlawful.

In contrast, where the Board has found that a grievance or lawsuit contravened a 10(k) award and was unlawfully "coercive," the sued contractor had directly assigned work to one group of employees rather than another.[12] The Board explained that the contract actions in those cases necessarily conflicted with the 10(k) award, and noted the difference from suits against the non-assigning employer for breach of a signatory subcontracting clause.[13]

Here, Local 530's lawsuit alleges that Eurotech violated its union signatory subcontracting clause by

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[11] Carpenters Local 33 (AGC of Massachusetts/Blount Bros.), 289 NLRB 1482, 1484 (1988); Iron Workers Local 751 (Hoffman Construction), 293 NLRB 570, 571 (1989). Accord: Hutter Construction Co. v. Operating Engineers Local 139, 862 F.2d 641, 644-45 (7th Cir. 1988).

[12] See Marble Polishers Local 47-T (Grazzini Bros.), 315 NLRB 520, 522-523 (1994); Roofers Local 30 (Gundle Construction), 307 NLRB 1429, 1430-31 (1992), enfd. 1 F.3d 1419 (3d Cir. 1993); Laborers Local 261 (Skinner, Inc.), 292 NLRB 1035, 1035 (1989). See also Longshoremen ILWU Local 7 (Georgia-Pacific), 273 NLRB 363, 366 (1984) and Longshoremen ILWU Local 32 (Weyerhaeuser Co.), 271 NLRB 759, 759 (1984), enfd. 773 F.2d 1012 (9th Cir. 1985), cert. denied 476 U.S. 1158 (1986) (unlawful to pressure employer, through lawsuit, to obtain work from another company that controlled and assigned the work and whose employees were awarded the work in a 10(k) proceeding).

[13] See Grazzini Bros., 315 NLRB at 523 fn. 7; Iron Workers Local 433 (Otis Elevator), 309 NLRB 273, 275 fn. 8 (1992), enfd. mem. 46 F.3d 1143 (9th Cir. 1995); Gundle Construction, 307 NLRB at 1430 fn. 4.

contracting out the stucco work to non-signatory Conti.[14] Once the subcontract was executed, it was Conti, not Eurotech, that actually controlled and assigned the stucco work.[15] Therefore, Local 530's lawsuit does not directly contravene the February 11 Panel Decision. Accordingly, even assuming the Panel Decision has the same effect as a Board 10(k) order,[16] Local 530's lawsuit is not coercive within the meaning of 8(b)(4)(ii)(D) and does not have an unlawful object.

Finally, we would not allege the Plasterers International representative's single threat to picket Conti as an independent violation of Section 8(b)(4)(D). Eurotech's charge attacks only the lawsuit and alleges, in significant detail, that the suit is coercive, while making no mention of this threat to picket. We would not solicit an amended charge to attack conduct with which Eurotech was

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[14] Eurotech contends that it and Local 530 did not have a meeting of the minds over the proposed successor agreement, so that there is no valid contract and no reasonable basis for the suit. However, Local 530 has at least a "colorable" claim that there is a contract. Thus, Local 530 arguably indicated that it accepted Eurotech's counterproposal by sending the Company a signed copy of the same signature page the Eurotech representative had signed. Moreover, the evidence indicates that Eurotech has complied with all provisions of the successor agreement, except for the breaches alleged in the lawsuit.

[15] This is not a case where the signatory contractor actually controlled the assignment of work by requiring the subcontractor to employ certain employees or by actually supplying employees for the subcontractor's use. Compare Iron Workers Local 433 (Swinerton Co.), 308 NLRB 756, 756 (1992).

[16] Thus, a lawsuit that contravenes an award from an "agreed-upon method of voluntary adjustment" is arguably "coercive" under Section 8(b)(4)(ii)(D) in the same way as a lawsuit that contravenes a Board 10(k) award. If Eurotech and Conti were both bound or willing to become bound to the Plan (it is well established that the company that ultimately controls and makes the job assignment – in this case Conti – is a necessary party to an agreed-upon method of voluntary adjustment, see Electrical Workers Local 702 (F.W. Electric, Inc.), 337 NLRB 594, 595-596 (2002)), there arguably was an "agreed-upon method of voluntary adjustment."

not concerned where such a charge would present difficult 10(b)[17] and agency[18] questions.

Because there is no reasonable cause to believe Section 8(b)(4)(D) has been violated, a Section 10(k) hearing would not be appropriate. Rather, the charge should be dismissed, absent withdrawal.

B.J.K.

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[17] It would be difficult to argue that the two allegations here are "closely related" within the meaning of Redd-I, Inc., 290 NLRB 1115, 1118 (1988). Although both allegations involve Section 8(b)(4)(D), they involve different facts, theories of violation, and defenses.

[18] There currently is no evidence supporting a theory that the Plasterers International representative was Local 530's agent. Thus, there is no evidence that Local 530 asked the International representative to communicate with Conti regarding the issue; that Local 530 was even aware that the International representative communicated with Conti regarding the issue; or that Local 530 manifested to Conti, or anyone else, that the International representative was its agent in any capacity. Compare Longshoremen ILA (Reserve Marine Terminals), 317 NLRB 848, 849-850 (1995) (international union's vice president deemed agent of Local 19, because international and Local 19 jointly demanded assignment of work, vice president threatened continuation of prior Local 19 picketing, and that threat materialized when Local 19 again picketed; however, international vice president not deemed agent of Local 1969, even though he also served as its business agent, because no evidence his conduct in this case was in capacity as business agent); Pipefitters Local 280 (Aero Plumbing), 184 NLRB 398, 398 (1970), enfd. 449 F.2d 668 (9th Cir. 1971) (union responsible for picketing by sister local where union informed sister local that employer would be in its jurisdiction, that employer had not signed a contract, and to be on the lookout and try to get the employer to sign the contract, rejecting ALJ determination that there was no evidence that the union directed, authorized, or ratified the sister local's picketing).